

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL WESLEY MOTT,

Defendant-Appellant.

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UNPUBLISHED  
February 17, 2009

No. 280671  
Berrien Circuit Court  
LC No. 2006-403209-FC

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321, and felonious assault, MCL 750.82(1). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of 60 to 180 months for the manslaughter conviction and 12 to 48 months for the assault conviction. He appeals as of right. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Charles Sorrels and Rodger Little had been friends since childhood. Little moved in with Sorrels and slept in the living room. Sorrels and Little met defendant in a bar in June 2006 to discuss the possibility of defendant doing some construction work for Sorrels' friend. On June 19, 2006, at approximately 11:00 p.m., defendant and his friend, Shannon Berndt, appeared at Sorrels' house, each bringing a couple of 22-ounce bottles of beer. Sorrels believed defendant was intoxicated when he arrived. Sorrels and Little had been drinking since noon. Defendant and Berndt came in through Sorrels' back door and the men sat at the kitchen table, talking and drinking. Berndt left the house at about 11:30 p.m. or midnight. According to Sorrels, defendant seemed irritated that Sorrels was not going to look at the job until the next day. When it became clear that defendant was annoyed that Sorrels did not have work for him immediately, defendant "flip[ped] [Sorrels] off" and told him to "(expletive) off." Sorrels asked defendant to leave two or three times. Little remained seated at the kitchen table.

Defendant eventually went out the back door, taking his last beer. Sorrels looked outside, made sure that defendant had left, locked the door, cleaned up, and got another beer. Sorrels then walked into the living room and saw that the front door was wide open. Little was lying in the middle of the front yard, directly in front of the porch. Defendant was standing over

Little, holding a baseball bat and kicking Little in the head and shoulder area. Little was not defending himself and appeared to be knocked out.

Sorrels ran outside. Defendant stepped over Little and came at Sorrels with a baseball bat. Defendant struck Sorrels on the left knee two or three times and once in the kidney area, but Sorrels was able to tackle him to the ground, where they continued fighting. Sorrels got defendant in a headlock and yelled at Little to take the bat, which defendant was still holding, and to call the police. Little took the bat and went inside. After more fighting between Sorrels and defendant, defendant finally left, and Sorrels went inside. Little was sitting on the couch, and Sorrels asked him how he was doing. Little said he would be all right and that there was no need to call anyone. The police had not arrived. Sorrels continued to drink and called the police himself at 3:12 a.m. The police never came and Sorrels eventually went to bed.

The next day, Sorrels got up at 1:00 p.m. He attempted to awaken Little several times, but could not do so. At 3:30 p.m., Sorrels called 911 and Little was taken to the hospital. Little had a massive brain injury that was probably caused by a blow to the head. He died four days later. There was testimony that Little probably would have survived if he had been treated sooner.

The police interviewed defendant before Little died. Defendant's version of the events that occurred inside Sorrels' home was similar to Sorrels' version. Defendant denied fighting with Little, but he admitted that he had an altercation with Sorrels after Sorrels struck him in the back of the head with nunchucks. Testimony adduced at trial included some telephone conversations that defendant had with his mother in which he claimed that he kicked Little in the stomach. Defendant initially denied that he made these statements, but after a tape was played to the jury, he stated that he may have kicked Little in the abdomen as he was falling, but could not remember how the second kick could have happened.<sup>1</sup>

On the second day of trial, defendant informed the court that although he had made prior arrangements for Eddie Mings to come from Missouri to testify, Mings had been taken to a hospital suffering from chest pains and heart problems. Defendant then asked for an adjournment to secure Mings testimony, or in the alternative, that Mings be allowed to testify via telephone. The trial court initially held its ruling in abeyance but eventually concluded that it would not grant the adjournment, seemingly unsure if Mings was actually in a hospital and unable to testify. Defendant then made an offer of proof that Mings would testify that Sorrels told Mings that "he [Mings] had better watch [it] or words to that [e]ffect, or he—Sorrels—was going to put him—Mings—in a coma just like he had done to [Little.]" Defendant also indicated that Mings would offer testimony that would be probative of Sorrels' perception of reality by introduction of evidence that Sorrels claimed that Mings was present on the night of the assault.

## II. Analysis

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<sup>1</sup> During a different telephone call to his mother, defendant stated that the clothes seized by police were not the clothes that he was wearing and attempted to dissuade her from telling the police what he was really wearing on the night of the assault.

Defendant first argues that the trial court deprived him of a fair trial by denying his motion for an adjournment to secure the testimony of a missing witness. A trial court's denial of a motion for a continuance is reviewed for an abuse of discretion. *People v Charles O Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A motion for an adjournment must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). In determining whether good cause exists, the trial court should consider whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. *Williams, supra* at 578; see also *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). Defendant must also demonstrate prejudice. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990); see also *Williams, supra* at 574-575; *Lawton, supra* at 348.

MCR 2.503(C) governs adjournments based on the unavailability of a witness. *Jackson, supra* at 276-277. The court rule states:

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

(3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary.

In this case, the trial court did not articulate the reasons for its decision or discuss the requirements of the court rule. See *Jackson, supra*. The court questioned whether the missing witness, Eddie Mings, was a critical witness. The court stated that defendant had a good excuse for the witness's absence. The court added that defendant had the burden of demonstrating materiality and potential resulting injustice, and that the court had discretion concerning whether to grant the request. The court later refused to adjourn the trial "because of the possibility that [the witness] may or may not be in the hospital." Thus, it appears that the court believed that defendant did not sufficiently prove that the witness was unavailable. It does not appear that the court found a lack of due diligence in defendant's efforts to produce the witness.

Concerning the requirements of the court rule, the record shows that defense counsel moved for a continuance as soon as he learned that the witness was in the hospital. The witness's testimony was material to defendant's claim that Sorrels, not defendant, inflicted the fatal injuries, and to the jury's evaluation of Sorrels' credibility. The witness was apparently admitted to the hospital on the evening he was supposed to drive to Michigan, and defense counsel actively sought to obtain more information concerning his condition. Thus, it appears

that defense counsel was diligent in seeking to produce the witness. We therefore conclude that defendant satisfied the requirements of the court rule. MCR 2.503(C)(1) and (2).

Concerning the requirement of good cause, defendant was asserting his constitutional due process right to present a defense, and he had a legitimate reason for asserting that right (because his witness had just been admitted to a Missouri hospital, suffering from chest pains). The witness was apparently admitted to the hospital on the evening he was supposed to drive to Michigan, so it appears that defendant was not negligent in securing his presence. Lastly, there is no indication that defendant had requested prior adjournments. Thus, we conclude that defendant also satisfied the good-cause requirement.

Because defendant showed good cause and satisfied the requirements of the court rule, we conclude that the trial court abused its discretion in denying defendant's request for an adjournment. Having found that the trial court abused its discretion in denying defendant's request for an adjournment, we next consider whether defendant was prejudiced by the trial court's denial of defendant's adjournment request. *Williams, supra*; *Lawton, supra*; *Sinistaj, supra*. Prejudice occurs when "the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (defining prejudice in the context of an unpreserved, nonconstitutional error), citing *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

At the outset, we note that whether defendant was prejudiced by the trial court's improper denial of his adjournment request is a close question. Examination of the proffered evidence indicates that Mings would have testified that Sorrels claimed that he (Sorrels) had put Little into a coma and that Sorrels' perception of reality was awry because he believed that Mings was at his home on the night of the assault. Dub Collins, who lived across the street from Sorrels, testified that Sorrels stated that after Sorrels and defendant had their altercation, Sorrels admitted to hitting Little with the baseball bat and knocking him out. Thus, the first part of the evidence offered by Mings would have been cumulative to Collins's testimony. Mings's additional testimony that Sorrels seemed mistakenly convinced that Mings was present during the assault, arguably has conflicting implications. Defendant argues that the statement proves that Sorrels had a warped perception of reality, and plaintiff argues that the evidence proves nothing further than what was already before the jury.

We concede the difficulty in trying to ascertain whether a single witness would have changed the outcome of a trial. In order to make such a finding, we must review all of the evidence and ascertain whether the testimony, if offered and presumably un rebutted, would have affected the outcome of the proceedings. Not all of the evidence used to convict defendant came from Sorrels. Defendant made statements to the police denying that he ever struck Little, although, after a tape recorded conversation defendant had with his mother where he admitted to kicking Little was played at trial, defendant was forced to recant his earlier statements denying that he struck Little. Additionally, taped conversations also revealed that the police had not seized the clothing worn by defendant on the night of the assault and in the taped conversations, defendant tried to convince his mother not to tell the police what he was really wearing on the night of the assault. All of the evidence presented at trial leads us to conclude that the exclusion of Eddie Mings's testimony did not affect the outcome of the proceedings. The evidence that Sorrels had admitted to being the assailant was already before the jury, and the issue of Sorrels'

belief that Mings was present during the altercation, while probative, does not rise to the level of evidence that would have affected the outcome of the proceedings. We therefore conclude that defendant was not prejudiced by the trial court's denial of his request for adjournment.

Defendant next argues that the trial court erred by failing to instruct the jury on gross negligence. Because defendant did not request an instruction on gross negligence at trial, this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763; *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Manslaughter is murder committed without malice, i.e., a death caused by the defendant's act, without justification. *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003). There are two forms of manslaughter, voluntary and involuntary. *Id.* at 535. Voluntary manslaughter is an intentional killing committed in the heat of passion, caused by adequate provocation. *Id.* at 535-536. Involuntary manslaughter has traditionally been defined as "the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Id.* at 536.

Defendant argues that the first formulation of involuntary manslaughter is not appropriate in this case because, before the victim died, he was charged with assault with intent to do great bodily harm, which is a felony. After the victim died, the information was amended and defendant was charged with involuntary manslaughter.

In *People v Holtschlag*, 471 Mich 1, 4; 684 NW2d 730 (2004), our Supreme Court considered whether an involuntary manslaughter charge was precluded where the victim died when the defendant placed a drug in her drink, which is a felony. The Court explained that "[i]nvoluntary manslaughter has, first and foremost, always been considered the 'catch-all' homicide crime." *Id.* at 6-7. "Thus, . . . [e]very unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse." *Id.* at 7 (internal quotations and citations omitted).

At common law and during a large portion of the evolution of felony murder, the phrase "unlawful act not amounting to a felony" served the purpose of distinguishing involuntary manslaughter, first from common-law murder, and more recently, from felony murder, both of which encompassed involuntary killings committed during the commission of any felony. *Id.* at 5-9. Since 1980, however, a felony-murder conviction requires proof of malice, not just proof of the commission of a felony. *Id.* at 9. Therefore, by reason of its nature as the catch-all murder charge, the "unlawful act" formulation of involuntary manslaughter now encompasses any unintentional killing committed without malice, regardless of whether the killing occurred during the commission of a felony or a misdemeanor or some other unlawful act. *Id.* at 9-10. The *Holtschlag* Court stated:

For this reason, defendants cannot opportunistically rely on [the] . . . description of the catch-all crime of involuntary manslaughter to argue that, because the homicide at issue occurred during the commission of a felony, they

cannot be guilty of manslaughter. That a “felony” has been committed is simply not dispositive in determining whether either “murder” or “manslaughter” has been committed and, thus, the “felony” language in [the traditional] . . . manslaughter description is essentially irrelevant. [*Id.* at 10.]

Thus, there is no merit to defendant’s argument that the “unlawful act” formulation of involuntary manslaughter may not apply to this case because the beating that caused the victim’s death amounted to a felony.

Defendant argues that under the second and third formulations of involuntary manslaughter, gross negligence is required. Therefore, defendant argues, the trial court erred in failing to sua sponte instruct the jury concerning the element of gross negligence.

Defendant’s argument is based on the failed premise that the first formulation does not apply in this case (because the assault was a felony). As previously discussed, however, the Supreme Court has done away with the “not amounting to a felony” language. In this case, an unintentional killing resulted from an unlawful act (an assault), assertedly committed without malice. Thus, the first formulation of involuntary manslaughter applies. That formulation does not require proof of gross negligence (or any other mens rea), at least not if defendant acted with the intent to injure.<sup>2</sup> *Holtschlag*, *supra* at 17-21. In the present case, evidence that defendant kicked the victim in the head supports a reasonable inference that he acted with the intent to injure. Thus, there was no plain error in failing to give a gross negligence instruction.

The second and third formulations define involuntary manslaughter as an unintentional killing committed without malice “during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *Mendoza*, *supra* at 536. Thus, both of these formulations arguably require proof of gross negligence. See *Holtschlag*, *supra* at 16-17. In the present case, however, a rational view of the evidence does not support a conclusion that the killing resulted from a “lawful act, negligently performed,” or from a “negligent omission to perform a legal duty.” Thus, it would have been improper for the trial court to instruct the jury concerning those formulations of involuntary manslaughter. See *id.* at 15 n 8; see also *Mendoza*, *supra* at 533.

Defendant also argues that trial counsel was ineffective for failing to request a gross negligence instruction. As previously discussed, however, only the first formulation of involuntary manslaughter was supported by a rational view of the evidence. That formulation does not require proof of gross negligence where, as here, there is evidence of intent to injure. Thus, a request for a gross negligence instruction would have been futile. Defense counsel was not ineffective for failing to make a futile request. See *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002); see also *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

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<sup>2</sup> The *Holtschlag* Court declined to decide whether proof of gross negligence is required where the defendant acts without an intent to injure. See *Holtschlag*, *supra* at 17-21.

Lastly, defendant argues that the evidence was insufficient to support his convictions. The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Concerning the involuntary manslaughter conviction, defendant argues that viewed in a light most favorable to the prosecution, the evidence failed to show that his actions were *the* proximate cause of the victim's death. Defendant does not challenge the remaining elements of the crime.

In *People v Tims*, 449 Mich 83, 96-97; 534 NW2d 675 (1995), our Supreme Court squarely rejected the argument that "a defendant is responsible for harm only when his act is the sole antecedent" cause of the harm. The proper test is whether the defendant's conduct was "a" cause, not "the cause," of the victim's death. *Id.* A victim's contributory negligence is a factor to consider in evaluating the defendant's actions, but it does not break the chain of causation and is not a defense. *Id.* at 97-99. The same is true of a third party's negligence. *Id.* at 99-101. Unless medical negligence was the cause of death, it is no defense to show that different medical treatment might have saved the victim's life and prevented the natural consequences of his wounds. *Id.* at 100. To hold a defendant liable in a criminal case, "the defendant's conduct must be the cause of the harm sine qua non,"<sup>3</sup> and "the harm must be a foreseeable risk of the defendant's conduct." *Id.* at 105.

In the present case, there was evidence that defendant inflicted a beating upon the victim. The victim was heavily intoxicated. The victim went to sleep afterward and his roommate did not seek medical care until the next day. The victim suffered a subdural hematoma and a brain contusion as a result of the beating, and later died of complications. Thus, the facts support a reasonable inference that defendant was a cause, sine qua non, of the victim's death, and that death was a foreseeable risk of defendant's actions. Viewed in a light most favorable to the prosecutor, the evidence was sufficient to enable a reasonable jury to find, beyond a reasonable doubt that defendant caused the victim's death.

Concerning the felonious assault conviction, defendant argues that Sorrels brought the bat outside, and that defendant threw a bottle at his head, if at all, only in self-defense. He claims that the prosecutor failed to disprove his claim of self-defense beyond a reasonable doubt.

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d

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<sup>3</sup> Sine qua non is defined as a cause without which the harm would not have happened. *Random House Webster's College Dictionary* (2d ed), p 1205. Literally, it means "without which not." *Black's Law Dictionary* (8th ed., 2004), p 1418.

763 (1993). Here, defendant claimed that he fought with Sorrels in self-defense. However, Sorrels testified that he saw defendant kicking and stomping on Little, and that he attacked defendant in defense of Little. Defendant fought with Sorrels, hit him with a baseball bat, and threw a bottle at his head. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant did not act in self-defense when he struck Sorrels with a bat and threw a bottle at his head. Contrary to what defendant argues, this Court may not substitute its judgment for that of the jury on matters of factfinding and credibility.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Stephen L. Borrello